UNITED STATES PATENT AND TRADEMARK OFFICE

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MICHAEL B. EINSCHLAG, ESQ.
25680 FERNHILL DRIVE
LOS ALTOS HILLS, CA 94024

EXAMINER
CLOUD, JOIYA M

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

-- *The MAILING DATE of this communication appears on the cover sheet with the correspondence address* --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE _3_ MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.
- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on _10 June 2009_.

2a)☒ This action is **FINAL**.   2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) _10-14 and 18_ is/are pending in the application.

    4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) _10-14 and 18_ is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

    Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

    Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

    a)☐ All   b)☐ Some * c)☐ None of:

      1.☐ Certified copies of the priority documents have been received.

      2.☐ Certified copies of the priority documents have been received in Application No. _____.

      3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

    * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)

2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) ☒ Information Disclosure Statement(s) (PTO/SB/08)
    Paper No(s)/Mail Date _10/24/2007_.

4) ☐ Interview Summary (PTO-413)
    Paper No(s)/Mail Date. _____ .

5) ☐ Notice of Informal Patent Application

6) ☐ Other: _____.

DETAILED ACTION

This action is responsive to the communication filed 06/10/2009. Claims 10-14 and 18 are PENDING.

Response to Arguments

A)   "...Gupta teaches no action is to be taken to prevent or even mitigate the effects of emptying a data buffer...Hence Gupta does not even address the problem solved by the invention of claims 10-14 and 18...Gupta only deals with a problem of limited bandwidth." "In sum, Gupta does not teach or suggest, in any manner, how to deal with issues of CPU availability."

As to the above argument A), Examiner respectfully disagrees.

In response to applicant's argument that Gupta is nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, the present invention pertains to the field of playback of media such as audio and audio-visual works which are retrieved from sources having non-deterministic delays. Examiner submits that as the prior art of records pertains to the efficient use of limited bandwidth thereby maximizing the practical applications of variable playback of multimedia streaming content such as audio and video, the prior art clearly relates to achieving synchronized playback of media content. Embodiments of the current invention disclose frame rate adjustments causing frames to be "skipped, discarded or merged." (paragraph 0020) Likewise, Gupta teaches bandwidth reduction by way of dropping

"lower-level dependent frames from the video stream." (). Thus, both the invention and the prior

art of record relate to the same field- that of time-scale modification of media content streamed

over a network, to achieve content integrity.

B)   Hoyer does not tech or suggest using CPU utilization for any purpose whatsoever

than to display it. Regarding claim 10, Applicant's submit that "there is no suggestion or

motivation to combine the teachings of Gupta and Hoyer in any way whatsoever."

As to the above argument B), Examiner respectfully disagrees. First, Examiner submits

that the instant merely recites, "determining *a measure* of CPU availability. No where does the

claim recite that the actual CPU availability is determined or furthermore, *how* such

determination is made. Additionally, the claim provides no requisite degree as to what

constitutes "a measure" Therefore, Examiner submits that given the terms "cpu availability"

and "cpu utilization" are well known in the art, a person of ordinary skill in the art would be

reasonably apprised to interpret *a measure of CPU availability* to include CPU utilization, the

effective inverse of CPU availability. Moreover, high availability implies low utilization and

vice versa, thus one is a measure of the other. Examiner suggest Applicant amend the claim

language to clearly recite the intended invention

Examiner also makes note of further disclosure of Hoyer that explicitly recite

"determining a measure of CPU availability" as recited in claim 10, where a cluster controller of

a performance monitor "determines the availability of servers by polling servers at regular

intervals to determine if each of the servers is still active. The cluster controller...responding to

name resolution request with the IP addresses of available web servers in the HAIS cluster." (see

col. 8, lines 33-40).

Lastly, in response to applicant's argument that there is no suggestion to combine the

references, the examiner recognizes that obviousness can only be established by combining or

modifying the teachings of the prior art to produce the claimed invention where there is some

teaching, suggestion, or motivation to do so found either in the references themselves or in the

knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071,

5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir.

1992). In this case, Examiner submits that the claimed limitation "determining a time-scale

modification playback rate considering the measure of CPU availability" is interpreted as the

measure of CPU availability is to be determined and considered before the step of determining a

time-scale modification rate. Thus, Hoyer is relied upon to teach a measure of CPU utilization

determined in order to perform a determining step. Hoyer does not merely teach CPU utilization

for the purpose of displaying only, see col.7, lines 22-26 and col. 8, lines 56-60, where Hoyer

discloses the collection of CPU utilization to "allow an administrator to assess performance of

Internet web sites." See also, where the number of available servers is determined in order to

determine server activity (col. 8, lines 33-40).

C)   Regarding claim 12, Applicant's submit that "neither Gupta nor Hoyer teaches

"wherein playing back comprises associating a time-scale modification playback rate with each

entry in a playback buffer queue.

As to the above point C), Examiner respectfully disagrees. Examiner submits, the

arguments presented with respect to the instant claim relies upon the infallibility of the

arguments presented with claim 10. Thus, the rejection of the instant claim is maintained for

substantially similar reasons.

D)   Regarding claim 14, Applicant's submit that "Gupta nor Hoyer teaches "wherein

the step of utilizing comprises ignoring or modifying the user input time-scale modification

playback rate when it would interfere with providing continuous playback." As such a

combination of Gupta and Hoyer would not arrive at the invention of claim 14. In fact Gupta

teaches the opposite, i.e. using the user input leads to an interruption.

As to the above point D), Examiner respectfully disagrees. Examiner submits that the

instant claim recites "ignoring or modifying the user input time-scale modification playback rate

when it would interfere with providing continuous playback." The claim limitation reciting

"when it would" is similar to stating "*if*". Language reciting a condition does not necessarily or

clearly require the method functionality to be performed, but merely states performing the

functionality (i.e. ignoring or modifying) *if* the condition is met or when it would be met.

Applicant should amend the instant claim to clearly require the steps which Applicant intends for

the claimed invention.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all

obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or
> described as set forth in section 102 of this title, if the differences between the subject
> matter sought to be patented and the prior art are such that the subject matter as a whole
> would have been obvious at the time the invention was made to a person having ordinary

skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 10-14, and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gupta **(US Publication No. 2002/0038374 A1)** in view of Hoyer et al. **(US Patent No. 6, 381, 635)**.

As per claim 10, Gupta teaches a method for playback of streaming media received over a non-deterministic delay network at a client device which comprises receiving the streaming media at the client device, which client device includes a CPU **(figure 1 and col. 7, lines 38-50)**; playing back the streaming media; determining a time-scale modification rate considering one user input time-scale modification to prepare the streaming media for playback **(col. 6, lines 39-48, user input is used for timeline modification changes and rate for playback at the client device and col. 6, lines 63-col. 7, lines 1-3)**; and providing an indication of a current time-scale modification playback rate to the user **(Figure 5, col. 10, lines 23-30)**.

Gupta does not explicitly teach determining a measure of *CPU availability*.

However Hoyer teaches determining a measure of CPU availability **(col. 7, lines 10-21)**.

Accordingly, it would have been obvious to one of ordinary skill in the networking art at the time the invention was made to have incorporate Gupta's teachings to the teachings of Hoyer, for the purpose of routing request to client servers that are active and available (i.e. servers that have not failed or are in standby mode, **col. 7, lines 10-21**).

As per claim 11, Gupta-Hoyer teaches a method further comprises steps of providing an indication of a user requested time-scale modification playback rate **(Figure 5, col. 10, lines 23-30).**

As per claim 12, Gupta-Hoyer teaches wherein the step of playing back comprises associating a time-scale modification playback rate with each entry in a playback buffer queue **(col. 10, lines 53-62).**

As per claim 13, Gupta-Hoyer teaches wherein the indication comprises a function of recent time-scale modification playback rates **(col. 10, lines 53-62).**

As per claim 14, Gupta-Hoyer teaches wherein the step of utilizing comprising ignoring or modifying the user input time-scale modification playback rate when it would interfere with providing continuous playback **(col. 8, lines 40-44).**

As per claim 18, Gupta teaches a method for playback of streaming media received over a non-deterministic delay network at a client device which comprises steps of: receiving the streaming media at the client device, which client device includes a CPU; playing back the streaming media; determining a time-scale modification playback rate as a function of the measure and utilizing time-scale modification to prepare the streaming media for playback **(col. 6, lines 39-48, user input is used for timeline modification changes and a time-scale modification speed is designated from the user for playback at the client device and col. 6, lines 63-col. 7, lines 1-3)**.

Gupta does not teach determining a measure, where the measure is of CPU availability.

However, Hoyer teaches determining a measure, where the measure is of CPU
availability **(col. 7, lines 10-21).**

Refer to the motivation of claim 10 which applies equally as well to claim 18.

CONCLUSION

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time
policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE
MONTHS from the mailing date of this action. In the event a first reply is filed within TWO
MONTHS of the mailing date of this final action and the advisory action is not mailed until after
the end of the THREE-MONTH shortened statutory period, then the shortened statutory period
will expire on the date the advisory action is mailed, and any extension fee pursuant to 37
CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event,
however, will the statutory period for reply expire later than SIX MONTHS from the mailing
date of this final action.

Any inquiry concerning this communication or earlier communications from the
examiner should be directed to Joiya Cloud whose telephone number is 571-270-1146. The
examiner can normally be reached Monday to Friday from on 7:30am-5:00pm. If attempts to
reach the examiner by telephone are unsuccessful, the examiner's supervisor, William Vaughn
can be reached on 571-272-3922. The fax phone number for the organization where this
application or proceeding is assigned is 571-273-3922. Information regarding the status of an
application may be obtained from the Patent Application Information Retrieval (PAIR) system.

Status information for published applications may be obtained from either Private PAIR or

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have questions on access to the Private PAIR system, contact the Electronic Business Center

(EBC) at 866-217-9197 (toll-free).

JMC

Art Unit 2444   **September 30, 2009**

                                           /William C. Vaughn, Jr./

                                           Supervisory Patent Examiner, Art Unit 2444